



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Administration and Management
From: Funmi Olorunnipa (Staff Counsel)
Date: April 17, 2014
Re: Revised Draft Recommendation for Guidance in the Rulemaking Process Project

[The following revised draft recommendation is based on the *Guidance in the Rulemaking Process: Evaluating Preambles, Regulatory Text, and Freestanding Documents as Vehicles for Regulatory Guidance* Project and related draft report and recommendations by Professor Kevin M. Stack of Vanderbilt Law School. This revised draft reflects changes made to the initial draft as a result of the Committee's discussion at its April 8, 2014 meeting and written comments received from Committee members and members of the public. This revised draft is intended to facilitate the Committee's discussion at its April 21, 2014 public meeting and not to preempt the Committee's discussion and consideration of the proposed recommendations. In keeping with Conference practice, a revised draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.]

[REVISED DRAFT] PREAMBLE

Over the past two decades, the use of guidance—nonbinding statements of interpretation, policy, and advice about implementation—by administrative agencies has prompted significant interest from Congress, executive branch officials, agency officials, and commentators. Most of this attention has been directed toward “guidance documents,”¹ freestanding, nonbinding policy and interpretive statements issued by agencies. While such guidance is often helpful to the public and is normally to be encouraged, commentators have expressed concern that agencies too often rely on guidance in ways that circumvent the notice-and-comment rulemaking process. The long-standing debate about guidance and its relationship to notice-and-comment rulemaking has,

¹ Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).



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however, largely overshadowed consideration of the function and varieties of *contemporaneous guidance*—that is, guidance that agencies provide about the meaning and effect of their rules in the rulemaking process. Contemporaneous guidance typically appears in three main forms. First, agencies provide guidance about the meaning and application of their rules in explanatory “statement[s] of their basis and purpose,”² statements which constitute the bulk of the regulatory “preambles” issued with final rules. Second, agencies sometimes provide guidance about the application and interpretation of their regulations in the regulatory text itself and appendices that appear in the Code of Federal Regulations (CFR). Third, when agencies promulgate their regulations, they sometimes issue freestanding guidance documents.

To identify, evaluate and address the practical implications resulting from the neglect of contemporaneous guidance in debates about guidance and rulemaking, the Administrative Conference commissioned the study underlying this Recommendation.³ Consistent with the Administrative Conference’s statutory mandate to promote more effective public participation and efficiency in the rulemaking process, the Conference issues this Recommendation. The Recommendation suggests best practices and important factors for agencies to take into consideration with regard to the use of contemporaneous guidance in statements of basis and purpose in agency preambles, in regulatory text and appendices, and in freestanding guidance documents. This Recommendation seeks to provide remedies for a number of key problems that have arisen regarding the use of contemporaneous guidance.

The Recommendation builds upon earlier Administrative Conference recommendations with regard to the use of guidance by agencies. Administrative Conference Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, identified the benefits for the agency and potentially affected parties of providing notice and an opportunity to comment prior to the agency’s adoption of what is now generally referred to as guidance (and

² 5 U.S.C. § 553(c) (2006).

³ See KEVIN M. STACK, GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE (APRIL 1, 2014) (draft report to the Administrative Conference of the U.S.), available at http://www.acus.gov/sites/default/files/documents/Guidance%20in%20Agency%20Draft%20Report_4_1_2014.pdf



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sometimes called “non-legislative” rules).⁴ That recommendation advised agencies to use notice-and-comment procedures when issuing or amending guidance.⁵ In Recommendation 92-2, *Agency Policy Statements*, the Administrative Conference advised agencies to impose binding standards or obligations only through use of the legislative rulemaking procedures of the Administrative Procedure Act (APA), typically through notice-and-comment.⁶ That recommendation also advised agencies to give notice of the nonbinding nature of general statements of policy and to allow parties an opportunity to challenge the wisdom of the policy statement prior to its application.⁷

The Office of Management and Budget’s *Final Bulletin for Agency Good Guidance Practices* (OMB’s *Good Guidance Bulletin*) reflected the concerns identified in these prior recommendations; the *Bulletin* obliged covered agencies to provide a means for public feedback on significant guidance documents and to undertake notice-and-comment procedures before promulgating economically significant guidance, among other things.⁸ However, neither of these prior recommendations addressed the guidance that agencies provide in preambles to final rules or in text that appears in the CFR. This Recommendation now extends the Administrative Conference’s prior attention to guidance by focusing on agencies’ widespread use of contemporaneous guidance.

Contemporaneous guidance has a fundamental fair-notice benefit. It furnishes the public and regulated entities with the agency’s understanding of its regulations at the time of issuance, as opposed to later in time or in the context of an enforcement proceeding, and can thereby reduce some of the uncertainty incident to any new regulatory change. In view of these benefits, the Conference’s study identified opportunities for greater incorporation of contemporaneous

⁴ Administrative Conference of the United States, Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 41 Fed. Reg. 56767, 56769-70 (Dec. 30, 1976).

⁵ *Id.*

⁶ Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30101, 30103-04 (July 8, 1992).

⁷ *Id.*

⁸ See *supra* note 1 at 3440 (Guidance Sections III and IV).



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guidance into agency rulemaking as well as some problems with agencies' current practices.⁹ Several of the problems and opportunities involving contemporaneous guidance relate to the preambles of final rules. Preambles not only justify the rule's legal sufficiency, but also serve a guidance function by conveying agencies' understanding of the purpose and effect of the rules. The Conference suggests that preambles to final rules could be drafted and organized in ways that better serve this guidance function. At the most basic level, some preambles fail to include the issuing agency's independent statement of the purposes of the rules adopted in light of the statute's objectives. Its absence reduces the usefulness of these statements in providing even the most basic guidance about the effect of the rules, and also does not reflect the governing understanding of what is required by the APA's provision that agencies accompany their final rules with a statement of the rules' "basis and purpose."¹⁰ To facilitate understanding of the effect of the rules they issue, agencies should provide in the preamble to final rules an independent statement of the purposes of the rule and its relationship to the authorizing statute's objectives.

Even when agencies provide such an independent statement, a well-designed organization of preambles can facilitate their guidance function. First, given the length of preambles to many major rules, locating preambular guidance can be difficult, particularly where a preamble is written as narrative discussion without clear structure. To assist in the identifying of preambular guidance, agencies should consider organizing their preambles to include a section-by-section analysis that provides explanation of the rule in sections that correspond to the sections of the rule. Second, in their final rule preambles, many agencies incorporate or rely upon discussions of the basis, purpose, or effect of the rule provided in the Notice of Proposed Rulemaking or other prior notices. This can save time and costs for agencies in preparing their preambles, but it also requires affected parties to integrate two or more agency treatments of the rule's basis, purpose, and effect. To make it easier to understand guidance provided in preambles, agencies should consider striving to make the preamble to the final rule a

⁹ See *supra* note 3 at 31-55 (identifying issues with current agency practices regarding contemporaneous guidance and setting forth recommendations for improvement).

¹⁰ 5 U.S.C. § 553(c) (2006).



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comprehensive statement of the rule's basis, purpose, and effect; and to the extent feasible, avoid the practice of incorporating or simply referring to prior statements on these matters in the rule's final preamble.

Agencies could also take additional steps to make it easier for the public and affected parties to locate the guidance content of regulatory preambles. Agencies could mention preambles in their webpages and other compilations of guidance, and begin developing ways to integrate the guidance content of their preambles into their indices or topical treatments of guidance. Agency policies on issuing guidance could also address the guidance content of their rulemaking preambles, including ways to enhance access to and the visibility of that content. In addition, for agencies covered by the *OMB's Good Guidance Bulletin*,¹¹ the guidance content of their preambles must comply with the *Bulletin's* procedural requirements. More generally, displaying electronic versions of regulations with hyperlinks to relevant portions of their preambles and other guidance—a practice with which some agencies are experimenting¹²—could make it easier to find this content, and holds promise for future innovation. The Conference encourages the Office of the Federal Register and Government Printing Office to work with agencies so that these innovations can be incorporated into the official versions of the CFR.

A separate but equally important problem is that some agencies misuse preambles by relying on statements in the preamble when they should rely on statements in the regulatory text instead. This problem is analogous to that addressed by the Administrative Conference in a prior recommendation on agency policy statements.¹³ To address this issue, agencies could avoid including statements in preambles to final rules that purport to specify the legal effect of particular actions or that could reasonably be read as legally binding. In particular, agencies could avoid the use of mandatory language in preambles to final rules except where that language is used simply to describe a statutory, regulatory, or constitutional requirement; or

¹¹ See *supra* note 1.

¹² See, e.g., <http://www.consumerfinance.gov/eregulations/1005> (visited April 15, 2014) (providing a copy of 12 C.F.R. Part 1004 with hyperlinks to section-by-section analysis from regulatory preamble and other navigation tools and links).

¹³ See *supra* note 6.



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where the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties.¹⁴

Agencies could also tailor the location of contemporaneous guidance to the needs and practices of the regulated population. For instance, when the agency knows that interested parties rely primarily on the CFR to understand the regulation, agencies might consider including notes and examples as guidance in the CFR, or preparing an appendix containing more general statements of guidance that appear in the CFR.

One last problem identified in the Conference's study is that many agencies' small entity compliance guides, required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),¹⁵ are difficult to find on their webpages, despite the SBREFA requirement that guides be posted on the agency website in an "easily identified location."¹⁶ To facilitate access to these guides and to encourage consistency in their coverage, it would be helpful to have a single repository with links to agency webpages with this content or to all agencies' small entity compliance guides themselves. The Office of Advocacy in the Small Business Administration already has a webpage devoted to SBREFA and is a logical home for such a repository or clearinghouse.

[REVISED DRAFT] RECOMMENDATION

Final Preamble Drafting

1. Consistent with governing law, in the preamble to final rules, agencies should include an independent statement of the purposes of the final rule, addressing why, in the agency's judgment, the rule advances statutory objectives.

¹⁴ OMB's *Good Guidance Bulletin* at 3440 (also including prohibition on using mandatory language in guidance documents with this qualification).

¹⁵ 5 U.S.C. § 601 note, § 212 (requiring the production of compliance guides whenever the agency must produce a regulatory flexibility analysis under 5 U.S.C. § 605(b), and quoting § 605(b)).

¹⁶ Id. § 212(a)(2)(A).



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2. Where feasible, for final rules with lengthy preambles, agencies should consider including a section-by-section analysis in which the organization of the preambular discussion corresponds to the organization of the final rules themselves.

3. Agencies should strive for the preamble to final rules to provide a comprehensive, freestanding statement of the basis, purpose, and effect of the final rule; and should, to the extent feasible, avoid incorporating prior published discussions of the rule's basis, purpose, and effect, such as those provided in the Notice of Proposed Rulemaking.

4. Agencies should avoid use of mandatory language in the preambles to final rules, unless the agency is using these words to describe a statutory, regulatory, or constitutional requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties. Such language should be understood to include not only mandatory terms such as "shall," "must," "required," and "requirement," mentioned in the *OMB Final Bulletin for Agency Good Guidance Practices* (*OMB's Good Guidance Bulletin*), but also any other language which purports to specify the future legal effects of particular actions, such as "will terminate," "will grant," and "will result in denial."

Policies on Guidance and Collections of Guidance

5. Agencies should integrate the guidance content of their preambles into their general compilations of guidance and their webpages devoted to guidance. At a minimum, agencies should mention preambles to their final rules as sources of guidance in their general compilations of guidance and on their webpages devoted to guidance.

6. To the extent agencies have policies on issuing guidance, those policies should address the guidance content of preambles to their final rules. For agencies covered by *OMB's Good Guidance Bulletin*, their policies should address compliance with the *Bulletin's* procedural requirements applicable to any significant guidance documents and economically significant guidance included in preambles to final rules.



Use of the Code of Federal Regulations for Guidance

7. Where the regulated population is understood to rely primarily on the codified text of the regulation to understand their compliance obligations, agencies should consider publishing notes and examples as guidance in the Code of Federal Regulations (CFR) or more general guidance in an appendix to the CFR.

Electronic Presentation of Regulations

8. The Office of the Federal Register and the Government Printing Office are encouraged to develop ways to display regulations in electronic form that will facilitate their understand and use by the public, such as the inclusion of hyperlinks to relevant guidance in the rules' preambles (and to other relevant guidance documents).

Small Entity Compliance Guides

9. The Office of Advocacy in the Small Business Administration should maintain a web accessible repository of small entity compliance guides produced by all agencies in compliance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) on the Small Business Administration's web page devoted to SBREFA. The repository can provide links to agency webpages with small entity compliance guides or links to the guides themselves.